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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARGARET E. CIRILLO et al.,

Plaintiffs and Appellants,

v.

DENNIS J. CROOKS,

Defendant and Appellant.

D054247

(Super. Ct. No. P192240)

CROSS-APPEALS from an order of the Superior Court of San Diego County,
Julia C. Kelety, Judge. Affirmed.

This action involves a dispute between Dennis J. Crooks and his sisters, Margaret E. Cirillo and Joan Meyer, regarding a trust created by their father, the John Crooks Separate Property Trust (the Trust). Dennis was named as the sole trustee of the Trust. After John died, all parties to this appeal became trust beneficiaries. (Another sister and trust beneficiary, Elizabeth Miller, did not participate in the litigation.) Margaret and Joan objected to Dennis's first account and report of trust assets, and petitioned to have him

removed as trustee for breaches of his fiduciary duties. The trial court found that Dennis had committed numerous breaches of his fiduciary duties, removed him as trustee, and appointed a successor trustee.

Dennis appeals, contending: (1) substantial evidence does not support an \$85,000 surcharge for the depreciation of the value of a trust asset caused by his delay in administering the trust and (2) the trial court erroneously failed to allow him the opportunity to purchase that trust asset and retain the accumulated rents. If we find that the trial court improperly surcharged him, Dennis argues that Margaret and Joan should bear their own attorney fees and that the Trust should pay his attorney fees. Margaret and Joan appeal that part of the order denying their request that Dennis be required to pay their attorney fees under Probate Code section 17211, subdivision (b) (hereafter section 17211(b), undesignated statutory references are to the Probate Code).

We affirm the surcharge order; accordingly, we do not reach Dennis's attorney fee arguments. We also conclude that Dennis waived his argument regarding purchase of the trust asset, and that the trial court did not err in how it awarded attorney fees to Margaret and Joan.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2003, John moved into Dennis's home and lived with him for 11 months before moving into a nursing home. After John moved out, Dennis spent \$16,000 to upgrade the bathroom in his home because John's incontinence had ruined the bathroom floor.

In 2004, Dennis purchased a \$350,000 condominium in Poway, California (the condominium) with John's money, but took title to the property as trustee of the Dennis J.

Crooks Revocable Trust, dated June 20, 2002. When John died, Dennis intended to take the condominium as part of his share of John's estate. In January 2005, John executed the Trust, naming Dennis as trustee. Dennis changed title of several of John's financial accounts to the Trust, but did not change the title to the condominium. John died on December 29, 2005.

In March 2007, Margaret petitioned for orders compelling an accounting, removing Dennis as trustee, appointing a successor trustee, and for relief from breach of trust. Joan joined in the petition a few months later. In July 2007, Dennis transferred title of the condominium to the Trust. In August 2008, Margaret and Joan filed separate objections to Dennis's amended first account and report. Both pleadings sought an award of attorney fees under section 17211(b).

The parties tried the matter to the court in August 2008. At the end of trial, the court removed Dennis as trustee, appointed a professional as successor trustee, and directed the immediate transfer of certain assets to the new trustee. After the trial court filed its statement of decision, Dennis moved for reconsideration or a new trial. The trial court partially granted Dennis's motion for reconsideration, but denied his request for a new trial.

In its amended statement of decision the trial court concluded that Dennis's actions in connection with the condominium constituted an impermissible conflict of interest and breached his duties of loyalty, impartiality and proper designation of trust assets. It found that Dennis's actions in connection with the bathroom remodel in his home constituted "gross negligence and willful misconduct" because the scope of the remodel exceeded the actual damage caused by John, and Dennis never attempted to apportion the repairs or pay for the value of the upgrades. The court also found that Dennis acted wrongfully by not paying

Margaret annual gifts from the Trust, and by placing her funds into a bank account. Because of this wrongful conduct, the court ordered that the bank account be liquidated and turned over to Margaret.

The trial court denied Dennis's request to be paid \$20,000 for his services as trustee; rather, it awarded the value of the bathroom upgrades as compensation for Dennis's proper trust administration activities. The court approved a \$20,000 payment from the Trust to Dennis's attorneys for their work administering the Trust, stating that any amount in excess of that amount was to be charged against Dennis's beneficial interest in the Trust. It also awarded Margaret and Joan their attorney fees out of the Trust under the "common fund" theory, in an amount to be determined.

DISCUSSION

I. Dennis's Appeal

A. Surcharge Amount

1. Facts

Margaret's retained expert, Bill James Brierton, testified that Dennis breached the prudent investor standard of care applicable to him as trustee in a number of ways, including by failing to promptly sell the condominium to settle the trust estate. Brierton testified that a delay in placing the condominium on the market of up to six months after John's death would have been reasonable. However, as of the time of trial, two and a half years after John's death, the condominium had not yet been placed on the market.

Gerald Richard Longwell, a real estate appraiser, testified that the value of the condominium was \$365,000 on December 29, 2005, the date of the trustor's death, and

\$280,000 on February 28, 2008, the date of Longwell's physical inspection of the condominium. Longwell opined that most of the decline in value of the condominium had occurred between late 2006 and early 2007, and that it would be difficult to quantify the progression of the decline on different dates. At the time of trial on August 28, 2008, the value of the property remained at \$280,000.

The trial court found that Dennis breached his duties as trustee, and that the Trust suffered damages based on his delay in administering it. Specifically, the court found that had Dennis not breached his duties, the condominium could have been sold before it declined in value, and that the proper measure of damages was the depreciation of the condominium resulting from the breach. (§ 16440, subd. (a)(1).) The court noted the value of the condominium at John's death in December 2005 (\$365,000), its most recent value in 2008 (\$280,000), and that most of the decline in the San Diego real estate market occurred in late 2006. It measured the depreciation at \$85,000, and surcharged Dennis that amount.

2. Analysis

Dennis does not challenge the trial court's findings that he breached his duties as trustee, and that the Trust suffered damages based on his delay in administering it. Rather, he contends that the evidence presented at trial did not support the surcharge amount because there was no evidence presented as to the value of the condominium in late 2006. Margaret and Joan assert Dennis is actually claiming that the court awarded excess damages, an issue they claim Dennis waived by failing to move for a new trial on that ground. (Code Civ. Proc., § 657, subd. (5); *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 122 [party is ordinarily precluded from asserting on appeal that a

damage award is excessive when it did not move for a new trial raising that issue].)

Assuming, without deciding that the issue has been preserved, we are unconvinced by Dennis's argument.

Where, as here, the "trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins and ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics in original.)

Dennis concedes that the trial court applied the proper measure of damages by comparing the value of the estate had there been no breach, to the value of the estate with the breach. He asserts that based on Brierton's testimony, there was no breach until at least six months after John's death. Dennis points out that in discussing his motion for reconsideration and new trial, the court noted that the end of 2006 was a reasonable time in which to have actually sold the condominium and distribute the proceeds. He claims, however, that the trial court had before it no evidence regarding the value of the condominium at the end of 2006; accordingly, the surcharge was not supported by the evidence. We disagree.

The amended statement of decision contains no finding as to when the breach occurred. However, the court specifically found that had Dennis not breached his duties, the condominium could have been sold *before it declined in value* in late 2006. Significantly,

the court heard evidence that, although the decline in the San Diego real estate market was difficult to quantify on various dates between the date of death and the time of trial, most of the decline occurred in late 2006 and early 2007. Thus, the court impliedly found that the condominium could have been sold for \$365,000, before its value declined in late 2006. Although the backbone of Dennis's argument is the notion that the condominium could not have been sold for \$365,000 before the market declined in late 2006, he cited no evidence to support this belief. Accordingly, the trial court correctly calculated the surcharge at \$85,000, or the difference between the value of the condominium at the time of the breach and the time of trial.

B. Purchase of Condominium

Dennis contends that even if the court properly imposed the \$85,000 surcharge, it erred by not giving him the opportunity to purchase the condominium at its appraised value at the time of John's death and retain the accumulated rents. Dennis, however, has failed to provide any citation to the record showing that he wanted to purchase the condominium and retain the rents, and that the trial court denied his requests. Accordingly, he has waived any claim of error. (*Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, 1256 [a party may not raise a new theory for the first time on appeal].)

II. *Margaret and Joan's Appeal*

Margaret and Joan both sought to recover their litigation expenses, including attorney fees, from Dennis under section 17211(b). Alternatively, should the court decide section 17211(b) was inapplicable, they sought their fees under the "common fund" doctrine. In its amended statement of decision, the trial court awarded Margaret and Joan their attorney fees

under the common fund theory. It determined that fees incurred by these two beneficiaries inured to the benefit of all four beneficiaries and should be paid by the Trust.

Margaret and Joan complain that the trial court erred when it failed to award them attorney fees under section 17211(b). They contend that a careful reading of the trial court's ruling suggests it misinterpreted the discretion conferred by section 17211(b). Alternatively, they assert the trial court abused its discretion. We reject both contentions.

A. Misinterpretation of the Statute

Margaret and Joan claim the court mistakenly interpreted section 17211(b) to confer discretion only to deny attorney fees to a trustee who acts without reasonable cause and in bad faith. They assert the trial court did not understand that the statute confers discretion to require a trustee who litigates without reasonable cause and in bad faith to pay the litigation expenses, including attorney fees, of a successful beneficiary contestant. Margaret and Joan's argument requires us to examine section 17211(b) and the amended statement of decision.

Generally, "[e]ven where successful, the beneficiaries must bear their own attorney fees in contesting an accounting of an estate. An exception exists only where the administrator opposes the contest 'without reasonable cause and in bad faith.' [Citation.]" (*Estate of Bonaccorsi* (1999) 69 Cal.App.4th 462, 473 (*Bonaccorsi*), fn. omitted.) Although *Bonaccorsi* relied on section 11003, which applies to probated estates, *identical* language is found in section 17211, applicable to actions relating to testamentary trusts. Review of the Legislative History for section 17211 (added by Stats. 1996, ch. 563, § 31), reveals that the Legislature enacted section 17211 to adopt the standards set forth in section 11003. (Cal.

State Bar Estate Planning, Trust & Prob. Law Section, Legislative Proposal, Sen. Bill No. 392, p. 1, excerpted from Senate Com. on Judiciary legislative bill file.)

Section 17211(b) provides: "If a beneficiary contests the trustee's account and the court determines that the trustee's opposition to the contest was without reasonable cause and in bad faith, the court *may* award the contestant the costs of the contestant and other expenses and costs of litigation, including attorney's fees, incurred to contest the account. The amount awarded shall be a charge against the compensation or other interest of the trustee in the trust. The trustee shall be personally liable and on the bond, if any, for any amount that remains unsatisfied." (Italics added.)

Under the plain language of section 17211(b), where a trustee opposes a contest to an accounting and the court determines that the opposition to the contest was without reasonable cause and in bad faith, the costs to the trust incurred in addressing the bad faith contest are chargeable back against the trustee, and the court has the discretion to award the successful contestant its attorney fees. Thus, section 17211(b) gives the trial court discretion to award attorney fees even if it concludes that the trustee opposed a contest to the trustee's account without reasonable cause and in bad faith. Margaret and Joan have not explained how the trial court could have misinterpreted these simple concepts. In light of the clear statutory language, we cannot conclude that the court misinterpreted the statute absent some indication in the record.

To support their argument that the trial court misinterpreted its discretion under section 17211(b), Margaret and Joan rely solely on the trial court's amended statement of decision. In its amended statement of decision, the trial court first addressed attorney fees to

Dennis for his proper administration of the trust, approving the payment of \$20,000 out of the Trust to Dennis's attorneys. Thereafter, the trial court dealt with Dennis's entitlement to the fees he incurred in litigating the matter. It correctly noted that under section 17211(b), a trustee that opposes a beneficiary's contest in bad faith and without reasonable cause may be ordered to pay attorney fees out of his interest in the trust. The court found that Dennis acted in bad faith and without reasonable cause, and that he incurred attorney fees defending his personal interests. Accordingly, it stated that any attorney fees Dennis incurred in excess of \$20,000 were to be charged against his beneficial interest in the trust.

The trial court then turned to Margaret and Joan's entitlement to attorney fees, finding they could recover fees under the "common fund" theory, and that the Trust should pay these fees because the work done by their attorneys benefited all four beneficiaries. Simply put, the trial court never addressed Margaret and Joan's request for attorney fees under section 17211(b). This omission does not support Margaret and Joan's argument that the trial court misinterpreted the statute.

Significantly, a party challenging the statement of decision must bring any omissions or ambiguities in it to the trial court's attention to avoid an implied finding on appeal in favor of the prevailing party. (Code Civ. Proc., § 634; *Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 59-60.) Had Margaret and Joan requested clarification of the amended statement of decision the trial court could have addressed any ambiguity or omission. (*Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1138 ["It is clearly unproductive to deprive a trial court of the opportunity to correct such a purported defect by allowing a litigant to raise the claimed error for the first time on appeal"].) Accordingly, to the extent

the amended statement of decision fails to directly address Margaret and Joan's entitlement to attorney fees under section 17211(b), we must imply that the trial court exercised its discretion to deny attorney fees under this statute.

Finally, although a party that has not filed opposition to a statement of decision does not waive objections to legal errors appearing on its face (*United Services Auto. Assn. v. Dalrymple* (1991) 232 Cal.App.3d 182), we do not agree with Margaret and Joan's contention that the face of the amended statement of decision reveals a misunderstanding of section 17211(b).

B. Abuse of Discretion

"In reviewing a trial court's exercise of discretion, we will reverse only when it is affirmatively shown a prejudicial abuse of discretion has occurred. [Citation.] The test is not whether we would have made a different decision had the matter been submitted to us in the first instance. Rather, the discretion is that of the trial court, and we will only interfere with its ruling if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge reasonably could have reached the challenged result. [Citation.]" (*Estate of Billings* (1991) 228 Cal.App.3d 426, 430.)

As a threshold matter, we reject Margaret and Joan's argument that the trial court's favorable, factual finding should be sufficient to entitle them to an award of attorney fees under section 17211(b). By this argument, Margaret and Joan seek to turn a discretionary award of litigation expenses into a mandatory award; this we will not do. (§ 12 ["'Shall' is mandatory and 'may' is permissive"].)

Margaret and Joan contend that even if the trial court correctly understood section 17211(b), its failure to order Dennis to pay their litigation expenses, including attorney fees, constituted an abuse of discretion because there were no countervailing considerations in this case that militated against such an award. They claim that Dennis displayed the epitome of bad faith by "threaten[ing] to hire attorneys and 'bankrupt' any beneficiary who challenged his administration of the Trust."

The question here is not whether the facts show that Dennis acted unreasonably and in bad faith, a finding made by the trial court that Dennis does not challenge in his appeal. Rather, the issue is whether, despite this finding, no judge reasonably could have denied Margaret and Joan their attorney fees under section 17211(b). Because we cannot say that no judge reasonably could have made such an order, it follows that we cannot conclude that the court abused its discretion.

Here, the already strained relationship between the parties further deteriorated after John died. In 2006, when counsel for all parties became involved in this matter, it could be said that Dennis's relationship with his sisters was beyond repair and the litigation was inevitable. This is not to say, however, that Dennis's actions after 2006 remained wrongful. Rather, the record shows that in 2007, Margaret and Joan *unsuccessfully* moved to remove Dennis as trustee, to appoint a professional trustee, and for an accounting. Thereafter, the parties *unsuccessfully* mediated the dispute. Thus, while Dennis's wrongful conduct undoubtedly *caused* this litigation, the court impliedly found that Dennis did not wrongfully perpetuate it.

Ultimately, the matter went to trial with the trial court addressing Dennis's wrongful conduct in connection with the condominium, the bathroom remodel, and his failure to pay Margaret annual gifts out of the Trust. Although Dennis had kept the rents from the condominium in his name, he properly segregated these funds and the trial court ordered that they be turned over to the successor trustee. These orders clearly show that Dennis did not plunder the Trust estate, which consisted of the condominium and about \$725,000 in liquid assets.

Under these facts, the court could have reasonably concluded that the Trust, rather than Dennis, should pay Margaret and Joan's attorney fees. Accordingly, the trial court did not abuse its discretion when it impliedly denied Margaret and Joan's request for attorney fees under section 17211(b).

DISPOSITION

The order is affirmed. Each side shall bear its own costs on appeal.

McINTYRE, J.

WE CONCUR:

NARES, Acting P. J.

AARON, J.